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IN THE

Supreme Court of the United States

October Term, 1968

CHENG HO MUI and PUN YI PAN,

Petitioners,

v.

DOMINICK RINALDI, as District Director for the Immigration and Naturalization Service of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the District of New Jersey.

Jurisdiction

The judgment of the Court of Appeals was entered on March 10, 1969. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Involved

1. Can the Immigration Service refuse to accept an application for classification as a refugee pursuant to Sec-

tion 203(a)(7), 8 U. S. C. 1153(a)(7) of the Immigration and Nationality Act of an alien who is not able to adjust his status in the United States?

2. Where the Attorney General is authorized to confer preference status as conditional entrants under the quota limitations upon alien refugees in non-Communist countries, 8 U. S. C. 1153(a)(7), is it proper for him to issue regulations precluding the issuance of such status to Chinese refugees in Hong Kong and the United States?

Statute Involved

Immigration & Nationality Act of 1952, as amended:

Section 203(a)(7), 8 U. S. C. [1964 ed., Supp. I] §1153(a):

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a) (ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they had fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the

President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Regulation Involved

Title 8, Code of Federal Regulations (CFR).

"§235.9 Conditional entries.

"(a) Countries in which applications may be filed. Pursuant to agreements entered into with the governments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act in Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries.

"(b) * * *

"(c) Application. A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form I-590 to the officer in charge of the near-

> est Service office outside the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for conditional entry into the United States. * * * The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival of such port within 4 months after the date of the approval. * * * ''

Statement

The petitioners are natives and citizens of China who fled from their homeland because of the Communist takeover of China. They entered the United States as crewmen. The petitioner, Cheng Ho Mui, arrived in the United States on February 16, 1965 and the petitioner, Pun Yi Pan, arrived in the United States on September 24, 1964. They have continuously resided in the United States since their respective entries. Each of the aliens had deportation hearings at which time they were found to be deportable. After their deportation hearings they were permitted to remain free on bond until April of 1966 when they were called upon to surrender for deportation.

On October 3, 1965 there was a broad base amendment to the Immigration Law for the purpose of liberalizing immigration to the United States. At that time, Section 203(a)(7) became law. This section authorized the admission of alien refugees into the United States as conditional entrants. Pursuant to this legislation, the Attorney General issued certain regulations which set up offices in

seven countries. No office was set up in Hong Kong nor in any other place in the Far East.

The petitioners, when called upon to surrender for deportation, made applications to the District Director in Newark, New Jersey requesting that they be classified as refugees and be granted preference status under the quota limitations of the immigration law. Simultaneously with the applications for classification as refugees, the petitioners also filed application for stays of deportation so that their applications for classification could be processed in the United States since there is no procedure for filing such an application, pursuant to Section 203(a)(7) either in Hong Kong or any other country in the Far East. These applications for classification and for stays of deportation were denied by the respondent on the grounds that the aliens could not adjust their status in the United States and, that the regulations precluded such applications from being made in the United States.

The petitioners then commenced this action in the United States District Court alleging that they were entitled to apply for classification as refugees in the United States since the regulations promulgated by the Attorney General did not permit such applications to be made in Hong Kong, the country to which they were to be deported; in fact, such application could only be made in seven countries in the world, all located in Europe, and these regulations arbitrarily eliminated them from applying for classification as conditional entrants in the United States. The respondent made a motion for summary judgment dismissing the complaint. The District Court (Coolahan, D. J.) granted the respondent's motion for summary judgment, dismissing the complaint.

An appeal was filed in the United States Court of Appeals for the Third Circuit from this determination. On

March 10, 1969 the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court.

Reasons for Granting the Writ

The decision below raises a number of important questions affecting the rights of refugee aliens both in and outside the United States.*

I

In October of 1965 for the first time in the history of our Immigration laws, Congress enacted permanent refugee legislation [8 U. S. C. 1153 (a) (7) Immigration and Nationality Act]. Previous legislative enactments and practices had been of a temporary nature only. The instant litigation affecting a potential 10,200 refugees annually, seeks an interpretation of the statute which might have been written in clearer language. Our quota limitations spell out seven categories of preferences for aliens [8 U. S. C. 1153 (a)]. Each of the first six preferences are available to aliens within and outside the United States. Applications are filed with District Directors of the Immigration Service in the United States or abroad. The statute reserves the seventh preference for refugees who have fled Communism, persecution or, catastrophic nat-

* Approximately sixty cases are presently pending in the United States Court of Appeals for the Third Circuit with reference to the questions involved herein. Included in this group is Cheng Fan Kwok, who was the Petitioner in the case of *Cheng Fan Kwok* v. *Immigration and Naturalization Service,* No. 630, June 10, 1968, 20 L. Ed. 2d 1037; 392 U. S. 206, which was reviewed by this Court. In that decision, the merits of the case were not considered by this Court, the sole question being one of jurisdiction.

ural calamities. It requires that applications for such preference be filed with the Immigration Service "in any non-Communist or non-Communist-dominated country". By regulation, 8 C. F. R. 235.9, the Attorney General adds and reads into the statute the words "other than the United States" and excludes applications for seventh preference in the United States. Under the regulations only those who are in Austria, Belgium, France, Germany, Greece, Italy and Lebanon may apply. These regulations are invalid for it is illegal to amend the statute by regulations where the enactment is unambiguous. Indeed they disregard the principle of statutory construction that remedial legislation should be liberally construed. *Do* v. *Esperdy*, 309 F. 2d 467 (2d Cir. 1952); *Sun* v. *Barber*, 144 F. Supp. 850 (N. D. Calif. 1956).

It is the position of the petitioners that since they are refugees who had fled from a Communist country and, since they are not nationals of the country in which their applications are made, then these applications can be made in the United States. They do not claim that their status can be adjusted here since the statute places a two year residency requirement for adjustment of status pursuant to this provision. [At the time they made the instant applications for stays of deportation they had not as yet been in the United States two years. However, they have now accumulated over two years' residency in the United States but their applications have not been amended because of the litigation]. They do argue that the classification determination can and should be made in the United States since there are many Immigration and Naturalization service offices in this country. The petitioners satisfy all of the requirements set forth in the statute but the Attorney General, acting in violation of law, has made them ineligible to apply for the benefits

of a supposedly liberal enactment. The aliens herein are irreparably harmed by these regulations because their deportations have been directed to Hong Kong; in fact, they would have been sent to Hong Kong if it were not for the institution of this action, and there is no procedure for them to make an application for classification as a refugee in Hong Kong. It was not the intention of Congress to prohibit refugees from the Far East to enter the United States. By regulation, the Government has not only excluded aliens in the United States from making such application, but has also excluded all aliens in the Far East from making such application by establishing offices to process these cases in Europe only.

The Government's position, which was supported by the Court below, is that the District Director does not have the authority to rule on these applications. However, the District Director, pursuant to regulations in effect now, does rule on applications for classification as refugees in cases where the aliens are eligible to adjust their status in the United States. In fact, the District Director is the only one who can rule on an application pursuant to Section 203 (a) (7) in the United States. The respondent's position is illogical because an alien, able to adjust his status in the United States pursuant to Section 203 (a) (7), must first submit an application to the District Director for classification. He must then make an application pursuant to Section 245 of the Immigration and Nationality Act to adjust his status in the United States. It does not necessarily follow, if an alien is classified as a refugee by the District Director, that he then must be granted permanent residence. In fact, the application for adjustment of status could be denied even though his classification application had been approved. If, in fact, the alien's class-

ification application was approved and then his application for adjustment of status was denied, he then, theoretically, should be able to apply in any country for the issuance of documentation to reenter the United States as a "conditional entrant". It is absurd to think that an alien whose application for classification as a refugee was granted by a District Director, would then have to travel to one of the seven countries enumerated in the regulations and again apply for classification as a refugee.

To fully understand the argument above, it might be helpful to examine the present statutory scheme and practice of persons presently applying for permanent residence within and outside the United States. A person in the United States who has a preference granted him pursuant to one of the first six subdivisions of 8 U. S. C. 1153 (a) has two ways of obtaining permanent residence in the United States; (1) he may apply to the Immigration Service in the United States for adjustment of his immigrant status to that of an immigrant pursuant to Section 245, 8 U. S. C. 1255; or (2) he may process his application at an American Consulate outside the United States. He would then travel to the American Consulate abroad, obtain a visa and then reenter the United States as a permanent resident. The second procedure would also be followed if the alien's application for adjustment pursuant to Section 245, were denied. [The denial of adjustment of status pursuant to Section 245 does not preclude the alien from obtaining a visa abroad.]

Thus we can see that the respondent's argument is a logical extension of the present visa issuance procedure with relation to the first six preferences of Section 8, U. S. C. 1153 (a). The construction urged herein is equitable and just in view of the additional fact that the Attorney General has seen fit to eliminate the Far East

area as a proper area for the filing of applications for classification as refugees.

The respondent contends that the Attorney General is limited in this procedure because of foreign relations policies. The petitioners do not wish to intrude upon the foreign relations of the United States. However, the foreign relations of the United States would not be affected one bit if an application for classification was adjudicated in the United States; in fact, there would be no such problem.

II

Under the present regulations there is no procedure for a refugee to make an application for classification in Hong Kong or in any other country in the Far East. It would appear from a simple reading of the statute that they are eligible to do so since there are Immigration offices in Hong Kong who can adjudicate such applications. The petitioners would be irreparably injured if they are forced to depart from the United States at this time. The petitioners are not asking for permanent stays of deportation nor adjustment of status. In fact, they have stated in their applications for stays of deportation that they will depart from the United States upon adjudication of their application as refugees. If they are deported to Hong Kong now they would not be able to travel to any of the seven countries in Europe where offices are set up for refugees to apply. The Attorney General has promulgated regulations which eliminate Hong Kong and other countries in the Far East as proper places where aliens can make applications for classification as refugees. Therefore, in fact, the petitioners would be barred from making any effort to reenter the United States pursuant to Section 203 (a) (7).

The petitioners, in their applications for stays of deportation, stated that they would depart from the United States upon the adjudication of their applications for classification as refugees. They are also willing to depart from the United States if an office to process such applications is provided in Hong Kong or in any other country in the Far East. The Government's argument with reference to the designation of an office in the Far East is that the foreign relations policy of the Government prohibits the operation of a refugee program in Hong Kong. Whether or not any attempt has been made by the Attorney General to see if it were possible to set up an office in Hong Kong, or in the Far East, has never been disclosed. Section 203 (a) (7) has now been in effect for three years and the respondent has failed to make any effort to process application for refugees in countries other than the seven enumerated in the regulations enacted shortly after the statute became law. When will the respondent act with reference to this situation? Unless the law is not to be read as it was enacted, but is to be modified by the implied addition of the word "European" before "Communist or Communist-dominated country or area" it is very hard to believe that a statute, whose prime purpose is to abolish the discriminatory national origin quota system and the Asia-Pacific triangle provisions, could be construed so as to perpetuate discrimination in this manner. The law must therefore be read as it was written and applied to refugees from all over the world.

The regulatory restrictions excluding numerous refugees within and outside the United States from the benefits of this preference is an issue which merits this Court's attention.

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals For the Third Circuit

PER CURIAM:

Appellants are Chinese nationals who escaped from mainland China and arrived in the United States in 1964 and 1965 as crewmen aboard a merchant vessel. When they overstayed the 29-day period allowed for alien seamen, they were given deportation hearings and ordered deported. They sought relief in the District Court where summary judgment was entered against them on motion of the district director of immigration.

The issue posed by this appeal involves a consideration of Section 203(a)(7) of the Immigration and Nationality Act [1] which provides for conditional entries into the United States by refugees following application to an Immigration and Naturalization Service officer "in any non-Communist or non-Communist dominated country", and also provides for the issuance of visas to certain refugees "who have been continuously present in the United States for a period of at least two years prior to the application for the adjustment of status".

Pursuant to the statutory directive, the Attorney General has promulgated regulations to administer these provisions, one of which, 8 C.F.R. §235.9, establishes immigration service officers to process refugee applications in the following countries: Austria, Belgium, France, Germany, Greece, Italy, and Lebanon.

Conceding that they were not continuously present in the United States for two years prior to the commencement

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[1] 8 U. S. C. A. §1153(a)(7).

of these proceedings, the appellants' claim for relief is based on two separate contentions: (1) the respondent, being the District Director of Immigration at Newark, New Jersey, is authorized to grant a conditional entry because he is an immigration service officer in a "non-Communist or non-Communist dominated country" and if he is not so authorized, then C.F.R. §235 is invalid for failure to list the United States as such a country; (2) in the alternative, they argue that the regulation is invalid because it failed to designate an officer in the Far East to whom the appellants could have applied for relief after escaping from China.

Because these identical arguments were presented and effectively answered in Tai Mui v. Esperdy, 371 F.2d 772 (2 Cir. 1966), cert. denied 386 U.S. 1017 (1967), we incorporate the following appropriate portions of Judge Friendly's opinion:

> "[Appellants] . . . . position is that the regulations dealing with conditional entries, 8 C.F.R. §235.9, are invalid for failure to list the United States as a non-Communist or non-Communist-dominated country where an alien may apply, be examined, and be granted a conditional entry with the consequent feasibility of his departure to another country from which he can enter the United States. At the very least, the plaintiffs contend, the regulations are arbitrary in listing only countries in Europe and the Middle East and excluding any in the Orient as places where applicants may be examined.
>
> "The first branch of the argument is quite unpersuasive. The natural reading of §203(a) (7) is that it accorded preference to two categories of refugees, those who were abroad and were seeking entry into the United States, and those who had already been here for two years. The 'conditional entry' device

was designed for the first group, the procedure of making a visa available in lieu of a conditional entry was intended for the second, and the obvious *casus omissus*—refugees here for less than two years—simply did not fall within the preferential scheme. If Congress had intended that refugees within this country not qualifying under the proviso for lack of two years residence should nevertheless be entitled to obtain in the United States the same treatment as those seeking entry from abroad, it would have found some way of saying this less awkward and susceptible to misinterpretation than including the United States under the rubric of 'any non-Communist or non-Communist-dominated country.' Furthermore, the House and Senate Committees said that the conditional entry procedure was 'not unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same,' the new term having been developed in order to avoid 'a connotation unfavorable to the alien.' H.R. Rep. No. 745 at 15, and S. Rep. No. 748 at 17, 89th Cong. 1st Sess. (1965), the latter reprinted in 1965 U.S. Code Cong. & Adm. News, pp. 3328, 3335. That statute had provided that the Attorney General "may parole into the United States, pursuant to such regulations as he may prescribe' an alien refugee-escapee who '(1) applies for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist-occupied * * *,' 74 Stat. 504 (1960). The regulations promulgated by the Attorney General pursuant to this grant of authority were nearly identical with those challenged by petitioners here, permitting application for parole

to be made only to 'the nearest office of the Service *in Europe,*' which applications were to be approved 'by an officer in charge *outside the United States.*' 8 C.F.R. §212.5 (1965) (emphasis added). If we would otherwise have had any doubts as to the consistency of 8 C.F.R. §235.9 with congressional intent, this would resolve them.

"Turning to the second branch of the argument, namely, that the regulation is invalid for failure to designate an officer in the Far East, we encounter the difficulty that even if we thought the claim well-founded, we could hardly direct the Attorney General to supply the office the plaintiffs want. The only recourse open to the courts would thus appear to be to stay deportation of all Chinese refugees who seek conditional entries until such an office was established or, for those who were eligible, they met the two year test of the proviso—strong medicine, indeed. Before seriously considering any such confrontation with the executive branch, we would require far weightier evidence or arbitrary action than has been presented. A letter from the Legal Adviser of the Department of State to the Assistant Attorney General in charge of the Criminal Division explains:

> 'Under the Act of July 14, 1960, commonly referred to as the "Fair Share" refugee law, the examination of refugees who made application for parole was limited to seven countries, namely, Austria, Belgium, France, Germany, Greece, Italy and Lebanon, whose governments had consented, pursuant to an agreement reached with the Department of State, to the presence of United States immigration officers within their respective territories

> for the purpose of examining applicants for parole into this country as refugees, and also to the return to such country within a period of two years of any refugees found to be statutorily inadmissible into the United States. The Congress was aware of these arrangements when it enacted Section 203(a)(7) of Public Law 89-236, and, at the same time, repealed Sections 1, 2 and 11 of the Act of July 4, 1960. * * * Consequently, the former procedures have been continued in force to facilitate the conditional entry of refugees under Section 203(a)(7). The Secretary of State and the Attorney General have agreed, however, that if it should develop later that any changes in these procedures are desirable, they will be promptly effected upon agreement betwen the Department of State and the Department of Justice.' . . . ."
>
> (Footnotes omitted; emphasis supplied in original.)

Another serious obstacle stands in the way of the appellants. They are alien crewmen. Even if they were permitted valid, conditional entry into the United States, they would be precluded from filing for a subsequent adjustment or status under Section 245 of the Immigration and Nationality Act, 8 U.S.C.A. 1255, which specifically provides:

> "The status of an alien, other than an alien crewman who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General . . ."

Section 203(a)(7) does not create any new procedure for the adjustment of status; it simply provides a means of entering the United States. It appears that the appellants cannot bring themselves within any adjustment of status

provision of the Immigration and Nationality Act because: (1) they have not been physically present in the United States for seven years nor have they served in the United States Armed Forces under the provisions of Section 244 (8 U.S.C.A. §1254(a)); (2) they are alien crewmen whose status cannot be adjusted under Section 245 (8 U.S.C.A. §1255); (3) they are not aliens lawfully admitted for permanent residence under Section 247 (8 U.S.C.A. §1257); and (4) they did not enter the United States prior to June 30, 1948, under Section 249 (8 U.S.C.A. §1259).

We find the appellants to be in the same position as was the petitioner in Wing Wa Lee v. Immigration and Naturalization Service, 375 F.2d 723 (9 Cir. 1967), also involving an alien crewman, where the court held there was no qualification under any adjustment of status provision.

The judgment of the District Court will be affirmed.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,393

CHENG HO MUI and PUN YI PAN,

Appellants,

vs.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey.

(D. C. Civil Action No. 368-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

VAN DUSEN, ALDISERT and STAHL,

Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed October 31, 1966, be, and the same is hereby affirmed.

Attest:

THOMAS F. QUINN,
Clerk.

March 10, 1969